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**Attorneys for Defendants Frank L. Davis, Harvest Marketing, LLC, and
First Harvest, LLC**

IN THE UNITED STATES DISTRICT COURT
STATE OF UTAH, CENTRAL DIVISION

JENNIFER STEIMKE, as trustee of the)
ODETTE GRAHAM TRUST, sole)
beneficiary of the MICHELON FAMILY)
TRUST, and sole devisee and representative)
of the ESTATE OF LYNDA STEIMKE)
MICHELON,)

Plaintiffs,)

JAE FORSCHEN, DAVID J. ORR,)
individually and dba WORLD)
CONTRACTUAL SERVICES, HARVEST)
MARKETING, L.L.C., FIRST HARVEST)
MARKETING, L.L.C., FRANK L. DAVIS,)
and JOHN DOES 1 through 10,)

Defendants.)

**MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Case No. 2:03CV00487 DAK

Judge Dale A. Kimball

Defendants Frank L. Davis, Harvest Marketing, L.L.C., and First Harvest Marketing, L.L.C.

(collectively, "Davis Defendants"), by and through counsel, submit this memorandum in opposition to

Plaintiff's Motion for Partial Summary Judgment Against Defendants Harvest Marketing, L.L.C., First Harvest, L.L.C., and Frank L. Davis.

RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

Regarding ¶¶ 1-18 of Plaintiffs' *Statement of Undisputed Facts*, the Davis Defendants do not dispute said statements of fact insofar as they are not contradicted by the Davis Defendants' Statement of Additional Facts outlined below, and only as they relate to Plaintiffs' Motion for Partial Summary Judgment.¹

19. *In early 2000, Michelin began pressuring Forschen for an accounting of what he had done with the MFT's \$100,000.00 and when she would receive her promised return. Forschen told her that it had been used for a "bridge loan" to First Harvest and that there was documentation evidencing the loan obligation. He advised her she would receive a return of \$75,000 in addition to her investment of \$100,000. (Forschen Dep., p. 143, l. 15 through p. 144, l. 13; p. 166, l. 20 through p. 168, l. 15; also see correspondence attached as Exhibit "J")*

RESPONSE: Disputed. The term "bridge loan" was Michelin's phrase and none of the referenced support for this allegation supports Plaintiffs' claim that the "bridge loan" was to First Harvest. (See, Forschen Depo., 143:15-144:13; 166:20-168:15 attached to Plaintiffs' Exhibit A; Plaintiffs' Exhibit J).

20. *In response to Michelin's demands for documentation, Forschen prepared the*

¹ Thus, this admission regarding ¶¶ 1-18 does not apply to the Davis Defendants' concurrent Motion for Summary Judgment.

promissory note attached as Exhibit "K." and arranged a meeting with Davis in the parking lot of the Sandy City Library late in the evening of February 9, 2000. Forschen told Davis that he needed Davis and his company to sign the note to "cover himself with Lynda" and "to show her that, you know, I had the note guaranteed" by Davis and his company. (Davis Dep., p. 77, l. 13 through p. 78, l. 24; Forschen Dep., p. 150, ll. 7 through 17)

RESPONSE: Admitted.

21. *Davis told Forschen that he would sign the note, but only if Forschen gave Davis a similar note from Forschen to Davis and his company, to indemnify them in the event that they had to pay on their note to MFT. (Large deposition quotation omitted).*

RESPONSE: Disputed to the extent Plaintiffs assert that the second note executed by Forschen was executed in his personal capacity rather than his capacity as the Michelon Family Trust trustee. (See, Plaintiffs' Exhibit M). Forschen agreed to indemnify Davis pursuant to the hand-written agreement on the back of the Davis Note. (See, Plaintiffs' Exhibit L). The second note executed by Forschen was as a trust officer and contains a personal guaranty by Forschen, which explains how Forschen had the authority to include the following provision in the second note:

The Promissory Note is the final expression of the terms and conditions of this loan transaction between Jae Forschen and Frank Davis of Harvest Marketing/First Harvest. This written agreement may not be contradicted by any evidence or any oral agreement. This personal [sic] guaranteed note by Jae Forschen replaces the note of Frank Davis', his personal guarantee [sic] and the 2000,000 shares of Harvest Marketing/First Harvest dated 15 November 1999.

22. Forschen agreed to give Davis his personal-indemnity note. On that basis, Davis signed the note to MFT personally and on behalf of his companies, and gave it to Forschen. Forschen gave Davis a copy of the note with a hand written promise to provide a note from Forschen personally to Davis and his companies. The hand-written promise reads:

I Jae R. Forschen personal [sic] will sign take over this note with all responicbles[sic] and obligations that will be belong to Jae R. Forshen [sic] 2/9/2000

[/s/] By Jae R. Forschen

The note referenced [sic] above is Promisory [sic] note between Michelin Family Trust and Harvest Marketing Dated 11/15/99 wherein Jae R. Forschen will execute a note with Frank Davis/Harvest Marketing taking over the liability of the note & all responsibilities associated with note.

[/s/] By Jae R. Forschen

(Davis Dep., p.100, 1.23 through p. 103, 1. 7; a copy of the hand written promise is attached as Exhibit "L").

RESPONSE: Disputed. See response to ¶ 21 above.

23. *Within a few days, Forschen delivered to Davis his personal indemnity note, a copy of which is attached as Exhibit "M" (Davis Dep., p. 75, 11. 1 through 3; p. 76, 1. 4 through p. 77, 1.12; Forschen Dep., p. 148, 1. 16 through p. 149, 1. 16)*

RESPONSE: Disputed. See response to ¶ 21 above.

24. *The Davis Note promised that "Harvest Marketing/First Harvest" would "pay [the]*

sum of One Hundred Seventy-five Thousand Dollars and zero cents, (\$175,000.00) to Michelin Family Trust" in one installment due on March 3, 2000. (Exhibit "M") It also provided that "[t]his agreement is personally guaranteed by Frank Davis" (Id.) It is not conditioned upon Davis receiving loan proceeds. Nor does it reference Forschen's indemnity note. (Davis Dep., p. 79, 11. 10 through 19)

RESPONSE: Disputed. See response to ¶ 21 above. Further, the Davis Note speaks for itself and to the extent Plaintiffs mischaracterize the Davis Note, the Davis Defendants dispute such mischaracterizations.

25. Davis admits that he did not intend to pay MFT under the terms of the note if the loan did not fund. (Davis Dep., p. 84, 11. 5 though 23)

RESPONSE: Disputed insofar as this paragraph ignores the fact that Plaintiff's trustee, Forschen, told Davis that Davis would not have to pay back the Trust any money if the loan did not fund, which goes to Davis' estoppel and fraud defenses. (See, Forschen Dep. 145:20-24; 152:18-153:4 attached hereto as Exhibit A).

26. At the time that Mr. Davis signed the Davis Note he knew that Forschen was going to show it to Lynda Michelin for the purpose of assuring her that she would receive a return on her investment and that her investment was secured. (Davis Dep., p 77, 1. 13 through p. 79, 1. 1)

RESPONSE: Disputed insofar as this paragraph mischaracterizes the Davis deposition testimony.

Davis's testimony is that he "understood from Jae that [Jae] needed this document to show the Michelin Family Trust people so that they could see – or some document showing them they were going to get their money back? * * * A. As I understand it, correct." (See, Davis Dep. 78:20-25 attached hereto as Exhibit B).

27. Davis also knew that Forschen would conceal from Michelin the fact that Davis and/or his entities ultimately had no intention of ever paying the Davis Note to Michelin: In fact, Davis and Forschen executed duplicate originals of the Davis Note so that the version of the note with the hand-written agreement between Forschen and Davis on the back could be retained by Forschen and Davis. (Davis Dep., p. 80, l. 24 through p. 82, l. 11) When confronted with this deception in his deposition, Davis accounted for his actions as "stupidity" or "naivety" on his part and retreated from his prior deposition testimony that he knew Forschen would show the Davis Note to FMT: (Large deposition quotation omitted).

RESPONSE: Disputed. Davis understood that Forschen intended to repay the Trust when the loan came through. Further, Davis only understood that the Davis Note that he had contained writing on the back and that Forschen's version of the Davis Note did not contain the same handwriting. (See, Davis Dep. 81:4-82:11 attached to Plaintiffs' Exhibit B). Also, the deposition transcript testimony Plaintiffs cite in support of this paragraph does not support Plaintiffs' contentions in this paragraph.

28. Forschen showed Michelin the Davis Note but did not disclose to her the Forschen

Note (either the hand-or type-written version). (Forschen Dep., p. 149, 11.17 though 25; p. 151, 11.2 through 8) . Michelin was not aware of the Forschen-Davis side agreement. (Forschen Dep., p. 152, 11. 4 though 6.)

RESPONSE: Admitted.

29. Forschen and Davis continued to work together on their scheme to obtain the Forschen-Davis Loan through at least October, 2000, and, perhaps, even as late as March, 2001. (Davis Dep., p. 94, 1.24 through p. 95, 1.. 4; p. 95, 1.25 through p. 96, 1. 10; Forschen Dep., p. 97, 1. 14 through p. 98, 1.11)

RESPONSE: Disputed insofar as Plaintiffs depict the efforts to obtain a loan as Davis' scheme. Plaintiff's trustee, Forschen, was the one pushing the efforts to obtain a loan. This was his idea in the first place because of the "problem" he created with the Trust. (See, Forschen Dep. 54:14-55:2 attached hereto as Exhibit A).

30. Even though Davis readily acknowledges that part of the consideration he received for signing the Davis Note was the reciprocal promise embodied in the Forschen Note, Davis has not asserted a cross-claim against Forschen because, according to Davis, "I don't think [Forschen] has a pot to pee in" (Davis Dep., p. 84, 1.24 through p. 85, 1.7)

RESPONSE: Disputed. The deposition testimony cited by Plaintiffs in support of this paragraph does not state that Davis readily acknowledge that part of the consideration he received for signing the Davis

Note was a reciprocal promise embodied in the second note.

31. *Forschen testified that the Davis Note was real and that he expected Davis to fulfill his obligation under the Davis Note. (Large deposition quotation omitted).*

RESPONSE: Disputed. Plaintiffs mischaracterize Forschen's deposition testimony and fail to reference the portion of his deposition testimony that supports this paragraph. Forschen never testified that the Davis Note was "real" or that he expected Davis to fulfill his obligation under the Davis Note. Instead, he testified that he expected the note to be fulfilled when the loan funded. (See, Forschen Dep. 152:18-153:4 attached hereto as Exhibit A).

32. *Although the March 3, 2000 maturity date under the Davis Note has long since expired, neither Forschen nor Davis or their entities paid MFT any amounts due under the Davis Note. (Forschen Dep., 153, 11. 21 through 24)*

RESPONSE: Disputed insofar as this paragraph implies that the Davis Defendants owed the Trust any obligation under the Davis Note. Davis Defendants did not fulfill whatever obligations they owed under the Davis Note because the loan never funded and because Plaintiff's trustee, Forschen, executed the second note which replaced the Davis Note. Further, even though the Davis Note contains no contingency language, it was Plaintiff's trustee's understanding that the Davis Note was conditioned upon "if everything went well" – i.e. if the loan funded. (See, Forschen Dep. 145:20-24 attached hereto as Exhibit A).

DAVIS DEFENDANTS' STATEMENT OF ADDITIONAL FACTS

1. The Davis Note was made by Defendants Harvest Marketing/First Harvest on behalf of the Plaintiff, Michelin Family Trust (the "Trust"). (See, Plaintiffs' Exhibit K).
2. Defendant Frank Davis personally guaranteed the Davis Note. Id.
3. Defendant Jae Forschen, trustee for the Trust, drafted the Davis Note. (See, Davis Dep. 73:6-75:3 attached hereto as Exhibit B).
4. Plaintiffs chose Forschen to be the trustee of the Trust and gave him authority to invest the Trust's funds. (See, Forschen Dep. 132:3-7 attached hereto as Exhibit A).
5. The Trustee made a note to Davis Defendants in his capacity as Trustee. (See, Plaintiffs' Exhibit M).
6. The Trustee gave Davis Defendants an indemnity agreement which was written on the back of the Davis Note. (See, Plaintiffs' Exhibit L).
7. The Trustee told Davis that Davis would not have to pay back the Trust any money if the loan did not fund, which goes to Davis' estoppel and fraud defenses. (See, Forschen Dep. 145:20-24; 152:18-153:4 attached hereto as Exhibit A).
8. The Trustee was the one pushing the efforts to obtain a loan which was his idea in the first place because of the "problem" he created with the Trust. (See, Forschen Dep. 54:14-55:2 attached hereto as Exhibit A).

9. The Trustee testified that he expected the Davis Note to be fulfilled when the loan in question funded. (See, Forschen Dep. 152:18-153:4 attached hereto as Exhibit A).

10. The Trustee understood that the Davis Note was conditioned upon “if everything went well” – i.e. if the loan funded. (See, Forschen Dep. 145:20-24 attached hereto as Exhibit A).

10. Only 8% of the loan was to go to the Davis Defendants; the remaining 92% was supposed to go to the Trust to be invested for “high-yield” purposes by the Trustee. (See, Davis Dep. 65:17-66:12 attached hereto as Exhibit B).

ARGUMENT

I. SUMMARY JUDGMENT IS NOT PROPER IF THERE IS ANY GENUINE ISSUE OF MATERIAL FACT

Under the Utah Rules of Civil Procedure, a court may not grant summary judgment unless the moving party establishes “[1] that there is no genuine issue as to any material fact and [2] that the moving party is entitled to judgment as a matter of law.” U.R.C.P. 56(c). When a court addresses a motion for summary judgment, the court’s function is not to weigh disputed evidence or to decide which side has the stronger case. Rather, the court’s “sole inquiry should be whether material issues of fact exist.” Draper City v. Estate of Bernardo, 888 P.2d 1097, 1100 (Utah 1995).

The nonmoving party is not required to “prove” its case in order to defeat a summary judgment motion. Rather, the nonmoving party is only required to submit evidence “sufficient to raise a genuine issue of fact.” Kleinert v. Kimball Elevator Co., 854 P.2d 1025, 1028 (Utah App. 1993). In addition, “If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party [and] the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment.” Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982). Finally, the nonmoving party’s evidence is to be believed for purposes of the motion, and if there is a conflict in the evidence as to a material fact, the motion must be denied. See e.g. Draper City, 888 P.2d at 1100-01.

Plaintiff’s cross-motion for partial summary judgment fails this standard.

II. ISSUES OF FACT EXIST REGARDING THE TRUST'S BREACH OF PROMISSORY NOTE CAUSE OF ACTION

Plaintiffs argue that the Davis Note is a valid and enforceable promise supported by consideration, and that the Court should thus grant the Trust summary judgment on this claim. Specifically, Plaintiffs claim that the Davis Defendants received consideration in the form of (a) an antecedent debt, (b) the indemnity Forschen provided the Davis Defendants, and (c) Michelon's forbearance on demanding her funds which Forschen transferred to Haldeman and Patterson. However, not only do these forms of consideration fail, but issues of fact exist as to the validity of the Davis Note. Further, the misrepresentations of Plaintiff's Trustee, estoppel, and the unconscionability of the Davis Note preclude the Court from enforcing the Promissory Note.

A. Issues of Fact Regarding the Validity of the Davis Note

In discussing the consideration issue, Plaintiffs conclusorily claim that the Davis Note is valid. On the contrary, the Davis Note is no longer valid against the Davis Defendants because the Trustee, Forschen, replaced it with the Trustee's Note.² Specifically, the Trustee's Note states:

The Promissory Note is the final expression of the terms and conditions of this loan transaction between Jae Forschen and Frank Davis of Harvest Marketing/First Harvest. This written agreement may not be contradicted by any evidence or any oral agreement. ***This personal [sic] guaranteed note by Jae Forschen replaces the note of Frank Davis', his personal guarantee [sic] and the 2000,000 shares of Harvest Marketing/First Harvest dated 15 November 1999.***

² Although Plaintiffs refer to this note as the "Forschen Note," as argued herein, this note was made by Forschen in his Trustee capacity. Thus, Davis refers to it as the "Trustee's Note."

(See, Exhibit M submitted by Plaintiffs; emphasis added). The Trustee's Note – drafted by Forschen – is “personal[ly] guaranteed . . . by Jae Forschen” because it contains a personal guaranty provision in it: “This agreement is personally guaranteed by Jae Forschen.” (See, Exhibit M). The existence of this personal guaranty provision within the Trustee's Note is one indication that Forschen executed the Trustee's Note in his trustee capacity. Otherwise, the personal guaranty provision makes no sense if the Trustee's Note is from Forschen personally, which would create a redundancy of Forschen's guaranty to Davis. Further, such an interpretation would render moot this personal guaranty provision in the Trustee's Note.

Another indication that the Trustee's Note is from Forschen in his official capacity as trustee of the Trust is from the above-quoted language: “This personal [sic] guaranteed note by Jae Forschen *replaces the note of Frank Davis*, his personal guarantee and the 200,000 shares of Harvest Marketing/First Harvest dated 15 November 1999.” (Emphasis added). If Forschen was executing the Trustee's Note in his personal capacity, he could have no authority to replace the Davis Note with the Trustee's Note. Only in his trustee capacity did he have the authority to replace the Davis Note, which was made out to his principal, the Trust, with the Trustee's Note. In other words, if the Trustee's Note was a note made by Forschen personally, there is no way Forschen, acting in his personal capacity, could replace or do anything to the Davis Note which was made out to the Trust.

As far as Davis understood, he was dealing with the Trust itself, through its legal representative

and trustee, Forschen. Clearly, Forschen had the authority to execute a note on behalf of the Trust. Plaintiffs cannot just pick and chose the times and situations when Forschen was acting as Trustee and when he was acting as himself personally.

Thus, the trustee replaced the Davis Note with the Trustee's Note, thereby eliminating the Davis Note and absolving the Davis Defendants of liability under the Davis Note. At the very least, the Trustee's Note is ambiguous as to the intent of the parties thereto and as to whether Forschen made the Trustee's Note personally or as trustee. These issues create a factual dispute ripe for the trier-of-fact to decide, rather than this Court on summary judgment.³

B. The Court Should Estop Plaintiffs From Enforcing the Davis Note Because of the Trustee's Representations and Promises to Davis, and Because the Davis Note is Unconscionable

In addition to denying Plaintiffs' summary judgment motion based on the face of the two notes, the Court should also deny Plaintiffs' motion based on estoppel and fraudulent inducement by Plaintiff's Trustee, and because the Davis Note is unconscionable.

³ "The underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract. 'In interpreting a contract, the intentions of the parties are controlling.'" WebBank v. American Gen. Annuity Serv. Corp., 2002 UT 88, ¶ 17 (citations omitted). Extrinsic evidence – including all the "attendant circumstances surrounding the execution of the document – "must be looked to in order to determine the intentions of the parties. If a contract is ambiguous, the court may consider the parties' actions and performance as evidence of the parties' true intentions." Id. at ¶¶ 19-20. "When ambiguity exists, the intent of the parties becomes a question of fact." Novell, Inc. v. Canopy Group, Inc., 499 Utah Adv. Rep. 27 at ¶ 20. "To demonstrate ambiguity, the contrary positions of the parties must each be tenable." R&R Energies v. Mother Earth Indus., Inc., 936 P.2d 1068, 1074 (Utah 1997).

1. Plaintiffs' Trustee Misrepresented the Davis Note to Davis

Fraud is an affirmative defense to a contract enforcement action.⁴ U.R.C.P. 8. When the Trustee presented Davis with the Davis Note, the Trustee represented to Davis that the Davis Defendants' obligations under the Davis Note were contingent upon the Trustee obtaining the loan in question. In fact, the Trustee only intended to enforce the Davis Note once the loan funded. Further, the Trustee represented that he needed the Davis Note simply to "cover himself with Lynda." (See, Davis Dep., 78:20-25; 81:4-82:11; attached hereto as Exhibit A; see also Forschen Dep., 150:7-17; 152:18-153:4; 145:20-24 attached in Plaintiffs' Exhibit A). In reliance on these representations from the Trustee, the Davis Defendants entered into the Davis Note which the Trust now intends to enforce to the detriment of the Davis Defendants and even though the loan has never funded (and never will).

The Trust's current actions form a fraud on the Davis Defendants. Accordingly, the Court should deny the Trust's efforts to enforce the Davis Note.

⁴ To establish fraud under Utah law, a party must prove by clear and convincing evidence each of the following elements:

'(1) That a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.'

Franco v. Church of Jesus Christ of Latter-Day St.s., 2001 UT 25, ¶33 (citations omitted).

2. Plaintiffs Should Be Estopped From Enforcing the Davis Note Due to Their Trustee's Own Representations to Davis

In addition to fraudulent inducement, the Court should preclude Plaintiffs from enforcing the Davis Note based on equitable estoppel. "In order to prevail on a claim for equitable estoppel a party must show that the party to be estopped acted in such a way as to induce reasonable reliance by the other party and that allowing the first party to act contrary to its earlier actions would work to the detriment of the relying party." IHC Health Servs. v. D & K Mgmt., Inc., 2003 UT 5, ¶ 10.

In the present case, the Trust should be estopped because through its Trustee it acted to induce reasonable reliance by the Davis Defendants on the Trustee's representations that the Davis Note would not be enforced until the loan funded. Davis Defendants relied on this representation when they entered into the Davis Note. To now allow Plaintiffs to act contrary to its earlier actions and representations would be inequitable and work a detriment on the Davis Defendants who have not received anything of value from the Trustee's attempts to secure a loan for the Trust's high-yield investments.

Accordingly, Plaintiffs should be estopped from enforcing the Davis Note.

3. The Davis Note is Unconscionable

One final basis upon which the Court should deny Plaintiffs' efforts to enforce the Davis Note is because said note is unconscionable. "Our consideration of whether a contract provision is unconscionable is made 'in light of the twofold purpose of the doctrine, prevention of oppression and

unfair surprise.”” Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 402 (Utah 1998) (citation omitted)

Substantive unconscionability, which alone may support a finding of unconscionability:

focuses on the contents of an agreement, examining the ‘relative fairness of the obligations assumed.’ [Citations omitted]. In determining substantive unconscionability, we consider whether a contract's terms are ‘so one-sided as to oppress or unfairly surprise an innocent party or whether there exists an overall imbalance in the obligations and rights imposed by the bargain ... according to the mores and business practices of the time and place.’ [Citations omitted].

Id. The Davis Note is miserably one-sided. It depicts a loan of \$100,000 based upon which the Trust would realize \$75,000 in interest. The Davis Note was made February 15, 2000 as testified by Davis (i.e. the date on the Davis Note is undisputably incorrect) and the Davis Note purports to be due March 3, 2000 – approximately two weeks later. Thus, that’s \$75,000 in interest over two weeks which is a 75% return of investment in two weeks. Calculated out to a per annum rate of return yields 1,950% per annum yield on the initial investment. Such interest is unheard of, and to say it does not oppress Davis or that it is fair is laughable. And this return is for funds that Davis never saw!

And these calculations do not even take into consideration the \$1000 per week late payment fee contained in the Davis Note which creates an additional 52% annual return on the Trust’s supposed investment. Accordingly, the Court should invalidate the Davis Note as being unconscionable.

B. No Consideration for the Davis Note

Plaintiffs assert that the Davis Note is supported by consideration in three ways: (1) the antecedent debt evidenced in the Davis Note, (2) the indemnity provided in the Trustee’s Note, and (3)

Michelon's inaction with respect to the funds.

1. No Antecedent Debt Is Evidenced in the Davis Note

The Trust argues there was consideration for the Davis Note in the form of an antecedent debt Davis supposedly owed the Trust, as evidenced by the Davis Note. However, the Davis Note fails to state anything about any antecedent debt (i.e. presumably, the up-front fee Forschen paid to kick-start the loan). Such would explain Plaintiffs' failure to quote or cite the evidence in the Davis Note supporting the antecedent debt. To the contrary, the Davis Note states, "The Promissory Note is the final expression of the terms and conditions *of this loan transaction between Michelin Family Trust and Harvest Marketing/First Harvest.*" (Emphasis added). At no time did the Trust loan the Davis' entities any money.

Also, even though Plaintiffs are fond of characterizing the loan as the "Davis loan," the undisputed testimony is that 92% of the loan proceeds were to go to the Trust, and only 8% were to go to Davis if the loan funded. (See, Davis Dep. 65:17-66:12 attached to Plaintiffs' Exhibit A). Thus, to argue that the up-front fee was to benefit Davis by obtaining a loan for him greatly distorts the testimony.

Further, Forschen first transferred the funds back-East for a high-yield investment which didn't work out. Just because Forschen then had the funds transferred to a loan program, in which he involved Davis (because the loan was required to go through an entity with accounts receivable), and

which could have benefitted Davis with 8% of the loan proceeds had the loan funded, does not equate to consideration to Davis for the Davis Note.

Thus, the alleged antecedent debt is not consideration for the Davis Note.

2. Forschen's "Indemnity Note"

Plaintiff asserts that the "indemnity note" from Forschen was consideration to Davis for the Davis Note.

First, to the extent Plaintiffs are referring to Forschen's indemnity agreement written on the back of the Davis Note, that was consideration from Forschen personally to Davis, for doing Forschen the favor of signing the Davis Note. It was not consideration from the Trust to Davis.

Second, to the extent Plaintiffs claim that the Trustee's Note was a personal indemnity from Forschen to Davis, again, such was personal from Forschen in exchange for Davis doing him the favor of signing the Davis Note. It was part of their own agreement, and did not involve the Trust.

Third, to the extent Plaintiff claims that the Trustee's note was from Forschen in his role as the Trustee (which it must to extend the consideration of the Trustee's Note to the benefit of the Trust), then such might satisfy the Trust's consideration problem. However, in this case, the Trustee's Note replaces the Davis Note (as set forth above) and so even if the Trustee's Note is valid consideration from the Trust, it effectively invalidates the Davis Note because it replaces the Davis Note.

3. Michelin's Inaction Was No Consideration to Davis

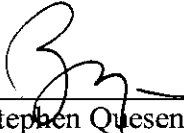
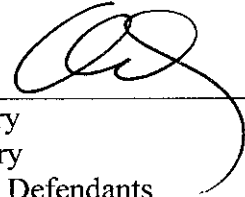
Plaintiffs also assert that the inaction by Michelin, upon receiving the Davis Note, was Davis' consideration for entering into the Davis Note. However, Michelin's inaction was no benefit to Davis. Instead, it benefitted the Trustee, Forschen, who was the target of Michelin's inquiries and demands. After all, Forschen was the one who drafted the notes and pushed Davis to sign the Davis Note because he was feeling the heat from Michelin. As for Davis, Michelin's action or inaction would not have affected Davis.

CONCLUSION

Based on the foregoing, issues of fact exist regarding whether Davis breached the Davis Note. Accordingly, the Court must deny Plaintiffs' Cross-Motion for Partial Summary Judgment.

DATED this 3 day of May, 2005.

HILL, JOHNSON & SCHMUTZ, L.C.

Stephen Quesenberry
J. Bryan Quesenberry
Attorneys for Davis Defendants

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 31 day of May, 2005, they caused a true and correct copy of the foregoing memorandum to be delivered to the following:

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David J. Orr
5449 Suntree Avenue
West Valley, Utah 84120

Sent Via:

☒ Hand -Delivery
☐ Facsimile
☐ Mailed (postage prepaid)

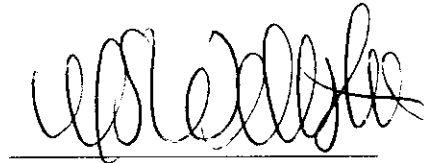
A handwritten signature in dark ink, appearing to read "David M. Wahlquist", is written over a horizontal line.

EXHIBIT “A”

1 IN THE UNITED STATES DISTRICT COURT
2 STATE OF UTAH, CENTRAL DIVISION
3 JENNIFER STEIMKE, as trustee of]
4 The ODETTE GRAHAM TRUST, sole]
5 Beneficiary of the MICHELON] Deposition of:
6 FAMILY TRUST, and sole devisee] JAE R. FORSCHEN
7 And representative of the]
8 ESTATE OF LYNDA STEIMKE MICHELON] Plaintiff, Civil No. 2:03CV-0487
9 Vs.]
10 JAE FORSCHEN, DAVID J. ORR,]
11 Individually and dba WORLD]
12 CONTRACTUAL SERVICES, HARVEST]
13 MARKETING, L.L.C., FRANK L.]
14 DAVIS, and JOHN DOES I-10,]
15 Defendants.]
16
17 June 4, 2004, 9:00 a.m.
18
19 Location: Kirton & McConkie
20 1800 Eagle Gate Tower
21 60 East South Temple
22 Salt Lake City, Utah 84111
23
24 Reporter: Peggy Grover, RMR
25 Notary Public in and for the State of Utah

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17 Also Present: Frank Davis
18
19 I N D E X
20
21 WITNESS
22 JAE R. FORSCHEN
23 Examination by Mr. Wahlquist 3
24 Examination by Mr. Quesenberry 183
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1
2 SALT LAKE CITY, UTAH, FRIDAY, JUNE 4, 2004, 9:00 AM
3 JAE R. FORSCHEN,
4 having first been duly sworn, was
5 examined and testified as follows:
6 EXAMINATION
7 Q. (By (Mr. Wahlquist) Please state your full
8 name.
9 A. Jae Richard Forschen, first name J-A-E, last
10 name F-O-R-S-C-H-E-N.
11 Q. Jae, my name is Dave Wahlquist. I am an
12 attorney representing the Michelon Family Trust and the
13 Odette Graham Family Trust in connection with an action
14 commenced against you and some others relating to funds
15 deposited by my clients. I have requested that you be
16 here today so that we can ask you questions regarding
17 what information you may have about those funds. You
18 understand that you have taken an oath to tell the
19 truth?
20 A. Yes.
21 Q. And you understand that the testimony that
22 you give in your deposition today may be presented to a
23 judge or jury in this matter?
24 A. Uh-huh.
25 Q. Is that yes?

1 A. Yes.
2 Q. Do you understand that it's important that
3 your testimony be as accurate as possible?
4 A. Yes.
5 Q. Will you agree that if any of the attorneys
6 here today ask you any questions that are unclear to you
7 that you will ask us to clarify our questions before you
8 answer?
9 A. Yes.
10 Q. May we clearly assume that if you answer a
11 question without asking for a clarification that you
12 believe you understand the question?
13 A. That would be my understanding, yes.
14 Q. Okay. Are you represented by counsel today?
15 A. No.
16 Q. So you are here by yourself?
17 A. Yes.
18 Q. Okay. Have you been deposed before?
19 A. No.
20 Q. You notice that we have a court reporter
21 present today?
22 A. Yes.
23 Q. And she's recording the proceedings of your
24 deposition. At the conclusion of the proceedings she
25 will prepare a transcript of what is going on today. You

1 me two answers. One was you said his company had some
 2 needs and then you gave a statement about other
 3 customers making money. And you have explained now that
 4 the company you were referring to that had some needs
 5 was Harvest Marketing that was looking for some funding?
 6 A. Yes.
 7 Q. So I am following up on the second part of
 8 your answer.
 9 A. Which?
 10 Q. That part of the reason Mr. Liston was
 11 introducing you to Mr. Davis was so that customers of
 12 WCS could make some money.
 13 A. My understanding of what transpired now,
 14 thinking about it, was I am pretty sure Paul took
 15 Harvest Marketing to Dave, and that's when the
 16 transaction probably between S&L Family Trust happened.
 17 Q. Okay.
 18 A. And whether anything else transpired, because
 19 in them talks I was not involved directly.
 20 Q. Okay. Was this before you met Mr. Davis?
 21 A. I would say yes.
 22 Q. Okay. So at the time you first met Mr. Davis
 23 he was already a customer of WCS?
 24 A. He was?
 25 Q. You are not saying he is a customer of WCS?

1 A. I don't-- he never became a customer of WCS.
 2 Q. Okay. But he had already done some
 3 transaction with WCS?
 4 A. He did some transaction would be my
 5 understanding, yes.
 6 Q. Okay. And that involved the S&L Trust?
 7 A. Yes.
 8 Q. And after that point in time he was
 9 introduced to you?
 10 A. Some time after that through Paul we got
 11 introduced, yes.
 12 Q. Why did Paul tell you he was making the
 13 introduction?
 14 A. I think persistence, or something else. I
 15 don't remember if Paul made it. I talked to him about
 16 an opportunity to get a company that had some
 17 receivables that we could do something with. We might
 18 be able to help Frank out and take care of this problem
 19 that I created.
 20 Q. So you told Paul that if you could find a
 21 company that had some receivables--
 22 A. Uh-huh.
 23 Q. --that you might be able to help Frank out?
 24 A. Uh-huh.
 25 Q. And take care of a problem?

1 A. Yes, a problem that I created with Ms.
 2 Michelin and her trust, yes.
 3 Q. Okay. When did you have this discussion with
 4 Paul?
 5 A. Fall of 1999.
 6 Q. Okay. Did you have--
 7 A. Or winter, I don't know, some time during
 8 that time frame.
 9 Q. How were you going to help Frank's company
 10 out?
 11 A. There was an organization back East that I
 12 was consulting with that was doing something, and I sent
 13 them some money, and they changed whatever it was they
 14 were doing initially and would not return that money.
 15 And they asked that if there was a company that had
 16 receivables that there was an opportunity to get a
 17 business loan on a debt elimination program.
 18 Q. What's that?
 19 A. It was a program that they said that they had
 20 people that could invest in, and I did not get into all
 21 the details on that, but they said that they needed
 22 somebody that had the strength of receivables and
 23 whatnot.
 24 Q. So how was the debt supposed to be
 25 eliminated?

1 A. I am not sure how that was-- that that
 2 transaction-- that was their side of the deal. I did not
 3 check into that thoroughly.
 4 Q. What was the name of the organization back
 5 East you referenced?
 6 A. I was dealing with a Maralee Haslam, I think
 7 is her last name.
 8 Q. Maralee Haldeman?
 9 A. Yes, and Burt Patterson.
 10 Q. Are you familiar with an enterprise called
 11 Rehab Company L&M, Inc?
 12 A. Yes.
 13 Q. So back at the time you had this discussion
 14 with Mr. Liston in the fall of 1999, you knew that Mr.
 15 Davis was a customer, you knew Mr. Davis had done a
 16 transaction with WCS and that his company was looking
 17 for money?
 18 A. Yes.
 19 Q. And you thought you had a way whereby his
 20 company could be helped?
 21 A. I thought that we could help them on this
 22 issue, we could.
 23 Q. Because you had become aware of an
 24 opportunity with this organization back East?
 25 A. This was the second program they brought this

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1 there is a document entitled Duties of the Co-Trustee
2 and Protector.
3 A. Yes.
4 Q. Is that a document that was generated by
5 World Contractual Services?
6 A. Yes.
7 Q. And following those pages we have some bills.
8 Do you see that?
9 A. Yes.
10 Q. There is a bill to Charlotte Georges
11 Enterprises, August 31, 1999?
12 A. Yes.
13 Q. And then there is a trustee fee charge?
14 A. Yes.
15 Q. Do you see that?
16 A. Yes.
17 Q. Did World Contractual Services charge trustee
18 fees to the trusts for its services?
19 A. Yes.
20 Q. So if you were trustee of the Charlotte
21 Georges Enterprises Trust, then World Contractual
22 Services would charge a trustee fee for that service?
23 A. Correct. But on this one-- Go ahead. Excuse
24 me.
25 Q. And the money to pay the fees generally would

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1 come from the trust?
2 A. Yes.
3 Q. The final two pages appear to be an unsigned
4 form Managers's Agreement for Charlotte Georges
5 Enterprises; is that right?
6 A. Yes.
7 Q. Tell me what those are all about.
8 A. That was the management was supposed to be
9 paid a fee for their services and that was to be
10 determined and it sets some guidelines between the
11 lines, manager and the trust.
12 Q. So for the trust there was a trustee fee and
13 a manager fee that would be paid each month?
14 A. Yes. Or whenever the dates were set.
15 Q. Now, we have talked about two different
16 trusts that you did in connection with Lynda Michelon
17 and one referred to a \$50,000 trust and which is also
18 the Charlotte Georges Enterprises investment; is that
19 right?
20 A. Yes, I believe so.
21 Q. What happened there was that the Odette
22 Graham Family Trust sent some money to the Charlotte
23 Georges Enterprises Trust; is that correct?
24 A. Say that question again. I am sorry. Could
25 you clarify it.

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1 Q. Well, Lynda's mother already had an existing
2 trust, didn't she?
3 A. Yes.
4 Q. And that was the Odette Graham Family Trust?
5 A. Uh-huh.
6 Q. Is your answer yes?
7 A. Yes.
8 Q. And so World Contractual Services formed a
9 trust for the investment by Odette Graham Family Trust.
10 A. Yes.
11 Q. And the name of that trust was the Charlotte
12 Georges Enterprises Trust?
13 A. I believe so.
14 Q. So the Odette Graham Family Trust sent some
15 money to the Charlotte Georges Enterprises Trust?
16 A. If that's how this transfer took place, I
17 guess that's correct. If you are making that a statement
18 I would have to say yes.
19 Q. Okay. Then World Contractual Services also
20 created the Michelin Family Trust for Lynda.
21 A. Yes.
22 Q. And there were funds sent from her IRA
23 account to the Michelin Family Trust?
24 A. Yes.
25 Q. Who was the initial trustee of the Michelin

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1 Family Trust?
2 A. I believe it was Dave.
3 Q. Were you a co-trustee?
4 A. I was co-trust officer, yes.
5 Q. Did that give you authority then to make
6 investments on behalf of this trust?
7 A. In this case, yes, it did.
8 Q. Who was the initial trustee of the Charlotte
9 Georges Enterprises Trust?
10 A. I imagine that was Dave.
11 Q. Were you a co-trustee as well?
12 A. Yes.
13 Q. You also had authority to make investments on
14 behalf of that trust?
15 A. Yes.
16 [EXHIBIT-7 MARKED.]
17 Q. You have been handed what has been marked as
18 Exhibit 7 this is a wire confirmation of money going
19 from Lynda Michelon's account to the Michelin Family
20 Trust in the amount of \$108,170.11. Is this consistent
21 with your understanding that on or about October 22nd,
22 1999, Lynda had that money sent to the Michelin Family
23 Trust?
24 A. Yes.
25 [EXHIBIT-8 MARKED.]

1 A. Yes.
2 Q. And you presented him with this note?
3 A. Yes.
4 Q. And asked him to sign it?
5 A. Yes.
6 Q. And he read it?
7 A. Yes.
8 Q. And he signed it?
9 A. We discussed it and then he signed it, yes.
10 Q. Okay. Do you recall when he signed it?
11 A. I do not.
12 Q. Do you recall where the two of you were at
13 the time that he signed it?
14 A. We met halfway-- well, not halfway. I think
15 we met down in Sandy at the library.
16 Q. Okay. You indicate on this note that it's
17 personally guaranteed by Frank Davis and 200,000 shares
18 of Harvest Marketing?
19 A. Yes.
20 Q. And you understood by this note that Frank
21 and his company were promising to pay the Michelin
22 Family Trust in accordance with the terms of this note?
23 A. Under the terms he would pay if everything
24 went well, yes.
25 Q. Well, the note didn't say anything about any

1 A. I would say yes.
2 Q. Okay. So in the part you wrote-- you are
3 indicating: "I, Jae R. Forschen personal will sign take
4 over this note with all responsibilities--"
5 A. Responsibilities.
6 Q. Why don't you read what you wrote there.
7 A. "--all responsibilities and obligations that
8 will belong to Jae R. Forschen. 2/9/2000."
9 Q. Is that the date you believe you signed that?
10 A. I would think I signed it that day, yes.
11 Q. Was this done at the same time that Frank
12 signed the note?
13 A. I would only say that is probably true.
14 Q. Okay. So you were intending to tell Frank by
15 this note that you were going to personally take over
16 the responsibilities?
17 A. Yes.
18 Q. To pay the Michelin Family Trust?
19 A. Yes.
20 Q. And then Frank wrote the next paragraph which
21 you also signed?
22 A. Yes.
23 Q. And in his clarification paragraph he
24 indicates that you personally will execute a note with
25 him and his company to take over the liability?

1 condition, if everything went well, does it?
2 A. No. Right, no, it doesn't.
3 Q. So you understood the note itself said that
4 he will make payments in accordance with its terms?
5 A. Yes.
6 Q. Now, at the time that Frank signed this note
7 did he express some concern to you about repayment of
8 it?
9 A. Yes.
10 Q. Did he explain to you that he wanted your
11 personal guaranty that if he had to pay on this you
12 would pay him?
13 A. Yes.
14 Q. You told him you would be willing to give
15 that to him?
16 A. Yes.
17 [EXHIBIT-11 MARKED.]
18 Q. You have been handed what has been marked as
19 Exhibit 11. Do you recognize this document?
20 A. Yes.
21 Q. Do you recognize any of the handwriting on
22 the document?
23 A. Above is mine and I think Frank rewrote that
24 and I signed both of them.
25 Q. Were they done at the same time?

1 A. Yes.
2 Q. Did you in fact do that?
3 A. Yes.
4 [EXHIBIT-12 MARKED.]
5 Q. In this note that we have just read on
6 Exhibit 11, you don't sign in either place on behalf of
7 Michelin Family Trust, do you?
8 A. No.
9 Q. In fact, you have used the word yourself in
10 your paragraph, this is a personal obligation.
11 A. Yes.
12 Q. And similarly in the part that Frank writes,
13 he indicates that you as an individual, not the Michelin
14 Family Trust, was going to execute the note?
15 A. Yes.
16 Q. You have been handed Exhibit 12. This is also
17 a document called Promissory Note Agreement; is that
18 right?
19 A. Yes.
20 Q. Now, did you create this document?
21 A. Yes.
22 Q. And did you do it after February 9, 2000?
23 A. Yes.
24 Q. Okay. After getting Exhibit 10 signed by Jae
25 and your signing Exhibit 11, you went back to the office

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some time later and made Exhibit 12?

- 2 A. Yes.
- 3 Q. And you signed it?
- 4 A. Yes.
- 5 Q. And you sent it to Frank?
- 6 A. Yes.
- 7 Q. And it indicates that Jae R. Forschen
- 8 promises to pay the sum of \$175,000 and zero cents the
- 9 Michelin Family Trust on behalf of Harvest Marketing and
- 10 Frank Davis' personal guaranty of the note dated
- 11 November 15, 1999?
- 12 A. That's correct.
- 13 Q. And then you signed it personally?
- 14 A. Yes.
- 15 Q. On behalf of the Michelin Family Trust?
- 16 A. That's correct.
- 17 Q. Okay. When you got this note, Exhibit 10,
- 18 from Frank, did you send a copy of it to Lynda Michelin?
- 19 A. Yes.
- 20 Q. Your purpose was to show her what had
- 21 happened with her money?
- 22 A. Yes.
- 23 Q. And to give her some expectation of when she
- 24 will be repaid?
- 25 A. Right.

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- 1 Q. You must have thought at the time that
- 2 payment was imminent?
- 3 A. Yes.
- 4 Q. Because you have the due date being March
- 5 3rd?
- 6 A. Yes.
- 7 Q. At the time you approached Frank on February
- 8 9, 2000 to sign Exhibit 10, did you have any discussion
- 9 with him about why you needed the note signed?
- 10 A. Briefly we did.
- 11 Q. What did you tell him?
- 12 A. Just to cover myself with Lynda.
- 13 Q. Okay.
- 14 A. To show her that, you know, I had the note
- 15 guaranteed, I had that money guaranteed.
- 16 Q. By Frank Davis and his company?
- 17 A. Yes.
- 18 Q. Did you explain that to Frank?
- 19 A. I believe so.
- 20 Q. Now, at the time that you and Frank talked
- 21 about this, did the two of you intend to do this to fool
- 22 or defraud Lynda?
- 23 A. No.
- 24 Q. Was this a genuine deal as you understood it?
- 25 A. As far as I am concerned I am still obligated

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- 1 to pay her money back, Lynda.
- 2 Q. Well, okay. But this reads, however, as I
- 3 read it, we have got a note from Frank and his company
- 4 to the Michelin Family Trust?
- 5 A. Uh-huh.
- 6 Q. And then we have got another note basically
- 7 from you to Frank and his company. So you didn't send
- 8 Lynda a copy of Exhibit 11?
- 9 A. No.
- 10 Q. And you didn't send Lynda a copy of Exhibit
- 11 12, did you?
- 12 A. No, I did not.
- 13 Q. You sent her 10 so that she would be
- 14 satisfied that an investment had really been made, and
- 15 that it was real, and that it was guaranteed, and that
- 16 it was going to be repaid?
- 17 A. Yes.
- 18 Q. And you told Frank that?
- 19 A. Yes.
- 20 Q. And you asked him to sign it?
- 21 A. Yes.
- 22 Q. So, again, did you intend to trick her or to
- 23 fool her?
- 24 A. No, I did not.
- 25 Q. So did you intend Exhibit 10 to be real?

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- 1 A. Yes, I mean also my note, too.
- 2 Q. Well, yours would be real, too. Right?
- 3 A. Yes.
- 4 Q. Lynda was not aware of Exhibit 12?
- 5 A. She was not aware that I guaranteed Frank's
- 6 note.
- 7 Q. Okay. So with what you sent her you intended
- 8 her to understand that Frank Davis and his company had
- 9 signed a note to her?
- 10 A. Yes.
- 11 Q. Was that the way it was or were you trying to
- 12 deceive her?
- 13 A. I was not trying to deceive her. I just let
- 14 her know this is the way it was happening and this is
- 15 how it transpired.
- 16 Q. Okay.
- 17 A. Now, I could be-- Well, leave it there.
- 18 Q. So did you expect him to honor his note?
- 19 A. I expected that note to be fulfilled, yes.
- 20 Q. Okay. You anticipated that at that point in
- 21 time that the loan would issue?
- 22 A. I was ensured that it was about to be done,
- 23 completed.
- 24 Q. And that you are going to make sure that the
- 25 note obligation that you had to Frank and his company

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1 and also the note obligation from Frank and his company
2 to Lynda Michelin were satisfied when those proceeds
3 came through?
4 A. Correct.
5 Q. But they didn't come?
6 A. Correct.
7 Q. So now there is an action Michelin Family
8 Trust against Frank on his note?
9 A. Yes.
10 Q. Do you understand that?
11 A. Yes.
12 Q. You understand that Frank and his company
13 have an obligation to pay that note?
14 A. Yes.
15 Q. You also understand that you have an
16 obligation to Frank and his company to take care of that
17 obligation for him?
18 A. Correct.
19 Q. That's a personal obligation?
20 A. Yes.
21 Q. As far as you know Frank and his company have
22 not fulfilled their note obligation to the Michelin
23 Family Trust, have they?
24 A. No, they have not.
25 Q. Nor have you fulfilled your personal

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1 obligation to Frank and his company?
2 A. No, I have not.
3 Q. And because of those obligations you have
4 been trying for up until six months ago to get Maralee
5 Haldeman to send money to you so you could make those
6 payments?
7 A. Correct.
8 Q. And up until six months ago you had some hope
9 she was going to do that?
10 A. She was ensuring me something would
11 transpire, that she would take care of it.
12 Q. But she never did?
13 A. She never did, correct.
14 Q. Instead she told you that Burt Patterson had
15 taken out some of that money himself?
16 A. Yes.
17 Q. And it is gone?
18 A. Yes.
19 Q. That's what she told you?
20 A. Yes, I mean through varied conversations,
21 maybe not that one, but there are varied conversations.
22 [EXHIBIT-13 MARKED.]
23 Q. You have been handed what has been marked as
24 Exhibit 13. This is a letter for Odette Graham by Lynda
25 Michelin as trustee for the Charlotte Georges

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1 Enterprises Trust; do you see that?
2 A. Excuse me. Say that again.
3 Q. This is a copy of a check.
4 A. Okay.
5 Q. That's paid to the order of the Charlotte
6 Georges Enterprises Trust?
7 A. Yes.
8 Q. That's in the amount of \$53,000?
9 A. Yes.
10 Q. Do you see the reference on the lower
11 left-hand side. It indicates Lynda S. Michelin, Trustee
12 for Odette Graham?
13 A. Yes.
14 Q. So this is the \$50,000 trust that you were
15 talking about?
16 A. That was sent, yes. Money that was sent, yes.
17 Q. Actually \$53,500?
18 A. Uh-huh.
19 Q. Is that a yes?
20 A. Yes. Excuse me.
21 Q. It was received in the Charlotte Georges
22 Enterprises account?
23 A. To my knowledge, it was, yes.
24 Q. And World Contractual Services formed the
25 Charlotte Georges Enterprises Trust?

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1 A. Yes.
2 Q. You mention that David Orr was trustee and
3 you were probably co-trustee?
4 A. Yes.
5 Q. All right.
6 [EXHIBIT-14 MARKED.]
7 Q. I am handing you what has been marked as
8 Exhibit 14, which is a promissory note from an entity
9 called Havelock to Charlotte Georges Trust dated October
10 1, 1999. Do you see that?
11 A. Yes.
12 Q. Tell me what this is all about?
13 A. The money that went internationally over to
14 Havesack under the supervision of Ted Widger and David
15 Orr.
16 Q. Okay. You said Havesack?
17 A. Havesack or Havelock. This says Havelock but
18 it may be Havesack. I will have to chick but it has got
19 Havelock here. I guess that would be correct.
20 Q. Do you know who prepared this document?
21 A. I have no idea who prepared it.
22 Q. Do you know who William Frearson is?
23 A. He is supposed to be the foreign trustee.
24 Q. For whom?
25 A. For Havelock, is my guess.

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT

Page

STATE OF UTAH, CENTRAL DIVISION

JENNIFER STEIMKE, as trustee) CIVIL NO. 2:03CV-0487
of the ODETTE GRAHAM TRUST,)
sole beneficiary of the) DEPOSITION OF:
MICHELON FAMILY TRUST, and) FRANK L. DAVIS
sole devisee and)
representative of the ESTATE) TAKEN: MAY 13, 2004
OF LYNDIA STEIMKE MICHELON,)
Plaintiff,) REPORTED BY:
v.) CARILEE DUSTIN, RPR
JAE FORSCHEN, DAVID J. ORR,)
individually and dba WORLD)
CONTRACTUAL SERVICES, HARVEST)
MARKETING, L.L.C., FIRST)
HARVEST, L.L.C., FRANK L.)
DAVIS, and JOHN DOES 1)
through 10,)
Defendants.) JUDGE DALE A. KIMBALL

Deposition of FRANK L. DAVIS, taken
on behalf of the Plaintiff, at 60 East South Temple,
Suite 1800, Salt Lake City, Utah, before CARILEE B.
DUSTIN, Certified Shorthand Reporter and Notary
Public in and for the State of Utah, pursuant to
Notice.

1 that named him Jae Friday.
2 Q. You never got the loan proceeds?
3 A. No. Never got a dime.
4 Q. Do you know how much it was supposed to be?
5 A. Well, I think originally it was like \$12
6 million. At least one of the documents was somewhere in
7 that neighborhood.
8 Q. You said you created a business plan to show
9 where the loan proceeds were going to go and how they
10 were going to be used. Do you still have that business
11 plan?
12 A. You know, most of the stuff I had, I moved all
13 of the stuff into a shed. And I tried to go through and
14 find everything that I could find. I -- I have -- don't
15 have a lot of documents left over. I don't know where
16 everything's gone.
17 Q. Now, the real intent was to use the proceeds
18 from that loan for one of these high yield programs,
19 right?
20 A. His intent, yes.
21 Q. Well, that's what the plan was that you and
22 Jae had.
23 A. My plan had nothing to do with what he was
24 going to do.
25 Q. Well, wasn't he going to use the proceeds from

1 the loan to --
2 A. No.
3 Q. -- to generate enough money to pay off the
4 loan and then give you some money?
5 A. No. He was going to leave with me a portion
6 of the loan so if it were -- I think it was eight
7 percent -- you know, it was like a million dollars was
8 going to be left with me out of the -- the balance went
9 to him. He did whatever he was going to do with it,
10 paid off the loan, et cetera, but I was getting -- I was
11 getting money out of the proceeds, not out of what he
12 did.
13 Q. But you were the borrower?
14 A. Correct.
15 Q. So you'd have to rely on him to repay the
16 loan?
17 A. That's correct.
18 Q. So the real use of the loan proceeds, I guess
19 a million of it was going to stay with you, or whatever
20 eight percent came out to, and the rest of it was going
21 to be used by Jae for investment in his high yield
22 program?
23 A. That's correct.
24 Q. Did you disclose that on the business plan
25 that you submitted to the proposed lenders?

1 A. No. No, I didn't. There wasn't -- in the
2 business plan itself, there was not a call to detail out
3 the use of proceeds. All I had to show was I had a
4 business purpose. And, you know, it wasn't a use of
5 proceeds type of request.
6 Q. Do you recall any of the lenders to whom you
7 submitted documents in connection with your attempts to
8 obtain a loan?
9 A. Do I recall them?
10 Q. Yes.
11 A. Only when I've looked at the documents. I
12 couldn't tell you offhand any one of them except Ammon,
13 I think, is one of them, as you alluded to earlier,
14 but --
15 Q. You thought Ammon was a lender?
16 A. They're not? I don't know. I mean, I
17 remember the name.
18 Q. Okay.
19 A. But, you know, there was banks, a couple of
20 banks. I do -- well, that's all I remember as far as
21 that goes.
22 Q. Did you do any other transactions with Jae
23 Forschen or World Contractual Services?
24 A. Did I? I did nothing -- well, nothing with
25 World Contractual Services. I was contacted late in

1 '99, asked to do a favor because of -- for David Orr.
2 He had a client that he wanted to ship some food to for
3 Y2K. And we shipped a year's supply of food out on
4 December 31st or December 30th to some guy in
5 Washington, overnighted it, Federal Express. That's --
6 I don't think I ever had any other interface or even
7 heard per se about David Orr, other than that this was
8 somebody he wanted to take care of.
9 Q. How about Jae Forschen?
10 A. Jae, the only thing that I did with him is I
11 got caught up a little bit in this high yield stuff and
12 was introduced from a friend of mine out of California,
13 Tony Fairchild, to two individuals back in Peoria,
14 Illinois, both of them preachers, and they got me on a
15 conference call and explained to me what they were doing
16 about these high yield programs. I ended up meeting
17 them in Las Vegas -- or, no, in California. They took
18 me to meet some people, showed me documentation of what
19 they had done in the past, what these people had done,
20 and I ended up putting some personal money with them,
21 wiring them some money for one of these high yield
22 transactions. I had another friend and a brother-in-law
23 that wanted to put some money in, and ultimately, I
24 think in dialogue with Jae, he wanted to do some, so he
25 put some money into that group.

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1 with him. I told him where I was going, in Sandy, and I
2 said, "I could probably sneak out for a little bit and
3 meet you." And so we decided to meet at the Sandy City
4 Library off -- whatever it is, 100th South and 13th
5 East.

6 So late that, you know, evening, I don't know
7 what time, maybe eight o'clock in the evening, it was
8 dark, in the parking lot at the Sandy City Library, he
9 pulled up, or he was there when I went there, and we
10 just got in -- I can't remember whether we got in my car
11 or -- I think he got in my car. And he -- I'm sure he
12 had told me something about this before this time, but
13 he explained to me that the monies that he had advanced
14 to this Bert and Maralee in Ohio for, quote -- what I
15 understood initially was for some high yield program,
16 that he was getting some pressure from the trust, and
17 that's when he was planning on repaying the trust out of
18 this loan that they were generating and asked me, you
19 know, basically, just to -- said, "I've got to show them
20 that the proceeds coming out of this loan is going to
21 pay off the trust."

22 Q. Show "them," meaning whom?

23 A. The trust, whoever.

24 Q. Okay.

25 A. The trustees or whoever he's dealing with.

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1 And, you know, I -- of course it was dark,
2 we're sitting in a car, and by that time I had developed
3 a friendship with Jae. I did not mistrust him.

4 Q. He was working regularly on trying to get you
5 this big loan?

6 A. Right. So I just said, you know, "There's no
7 way I'm going to sign a note and obligate myself because
8 I have no idea this loan is going to materialize or
9 not." And, you know, of course he assured me every
10 which way but loose that the money was coming, that if
11 it didn't come that way, it was coming another way,
12 whatever, so -- and I said, "The only way I'll do this
13 is if you sign a note, you know, equal, identical note,
14 saying that this is your responsibility," whatever.
15 "The fact that you want the money that's coming into the
16 corporation, or the money that's coming in to Harvest
17 Consulting on this loan, if you want to pay this money
18 back out of that, I don't have a problem with it." You
19 know, and he wanted to do -- have some document to
20 evidence that that was going to happen.

21 But I just said, "I'm unwilling to do it
22 unless you indemnify me, or whatever, because I have
23 no -- I don't have the same level of confidence and
24 faith you do that the loan's going to materialize."

25 So he took the original note and we wrote on

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1 the back of that, you know, that he was going to execute
2 an identical note and do that, which he did a few days
3 later.

4 Q. Later?

5 A. A couple, two or three days later. And
6 candidly, you know, I don't know -- I don't believe I
7 really even registered or thought about the fact that
8 the date was not the date we were doing it. And I
9 didn't even ask him about it, you know, when he had
10 drafted the note, or what the purpose -- but, you know,
11 I know that we signed this in February, on February 9th.
12 That's one of the few dates I know exactly when we did
13 it.

14 Q. Why do you know that date?

15 A. It was because it was my sister-in-law's
16 birthday. That's when I was up there. And my wife
17 wrote it down in her Day-Timer.

18 Q. You note on this document you apparently are
19 signing as president of Harvest Marketing/First Harvest.

20 A. I notice that.

21 Q. You note that the lender is the Michelin
22 Family Trust.

23 A. That's correct.

24 Q. And Jae is apparently signing it as a trust
25 officer.

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1 A. Correct.

2 Q. Not as himself individually?

3 A. Right.

4 Q. Now, if you'll take a look at the next page,
5 is this next page the note that you were talking about
6 that Jae prepared as your indemnity note?

7 A. Correct.

8 Q. You'll notice it's dated February 15, 2000.

9 A. That's correct.

10 Q. And Jae himself is promising to pay the sum of
11 \$175,000 and zero cents to the Michelin Family Trust on
12 behalf of Harvest Marketing/First Harvest and Frank
13 Davis' personal guaranteed of the note dated 15 November
14 1999.

15 A. Correct.

16 Q. And then if you look down, at the bottom, it's
17 got Jae signing personally.

18 A. That's correct.

19 Q. Not as a trust officer or on behalf of
20 Michelin, right?

21 A. Correct.

22 Q. In fact, his promise in this document was to
23 pay Michelin on your behalf?

24 MR. QUESENBERRY: And I'll object. That calls
25 for a legal conclusion. Speaks for itself.

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1 Go ahead and answer.
2 THE WITNESS: I mean, yeah, I can -- that's
3 what the document says, right.
4 Q. (By Mr. Wahlquist) Right. And again, up at
5 the top right-hand corner of the document, it lists Jae
6 Forschen individually, not representing some other
7 person or entity; is that right?
8 **A. That's correct.**
9 Q. Did he give you this document?
10 **A. Yes.**
11 Q. And you signed it?
12 **A. I did.**
13 Q. Now, returning to the promissory note
14 agreement dated November 15, 1999, you knew that you
15 were signing a document at that time which by its terms
16 said that Harvest Marketing/First Harvest promised to
17 pay \$175,000 to Michelin Family Trust?
18 **A. Did I know I was signing a document?**
19 Q. That said that.
20 **A. Yes.**
21 Q. Jae asked you to sign it?
22 **A. That's correct.**
23 Q. He said that he needed this document so that
24 he could satisfy some concern of the Michelin Family
25 Trust people?

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1 **A. As far as I understand it, yes.**
2 Q. So you signed it so he would have some
3 document to show them to satisfy them?
4 **A. He wanted to show them that the monies, quote,**
5 **there were, as he -- I was confident was coming through**
6 **this loan was going to be paid back -- or money out of**
7 **that was going to be paid to Michelin Family Trust,**
8 **right.**
9 Q. Well, this promissory note agreement doesn't
10 say anything about some loan somewhere, does it?
11 **A. No.**
12 Q. It doesn't talk about any high yield
13 investment program?
14 **A. That's correct.**
15 Q. This simply, as you understand it, is a
16 straight-up promissory note saying Harvest
17 Marketing/First Harvest would pay Michelin Family Trust
18 \$175,000 on March 3, 2000; is that right?
19 **A. That's right.**
20 Q. You understood from Jae that he needed this
21 document to show the Michelin Family Trust people so
22 that they could see -- or some document showing them
23 they were going to get their money back?
24 **A. As I understand it, correct.**
25 Q. So you accommodated that request?

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1 **A. That's right, based on him signing.**
2 Q. At the time you signed this document, you did
3 not intend for Harvest Marketing or First Harvest to pay
4 the Michelin Family Trust any amount, did you?
5 **A. If money came in and that's what -- that Jae**
6 **was facilitating, I mean, that's where he wanted it to**
7 **go, that would be fine with me.**
8 Q. If the money came in?
9 **A. Sure.**
10 Q. Does this document say that it's conditional
11 upon whether the money comes in or not?
12 **A. The only condition that I required is that he**
13 **sign it to take that obligation.**
14 Q. I'm talking about the promissory note
15 agreement.
16 **A. No.**
17 Q. It doesn't say anything about any condition,
18 does it?
19 **A. No.**
20 Q. And it doesn't say that Jae is signing another
21 note at the same time personally promising to pay off
22 this obligation?
23 **A. It does on the back of it.**
24 Q. Okay.
25 **A. That original note.**

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1 Q. Do you have that?
2 MR. QUESENBERRY: You have it. It's right
3 there, Exhibit 1, page 28.
4 MR. WAHLQUIST: I have the original note?
5 MR. QUESENBERRY: No. You have this language
6 on the back of it.
7 Q. (By Mr. Wahlquist) Do you have the original
8 note?
9 THE WITNESS: I think you have it, don't you?
10 MR. QUESENBERRY: It's Exhibit 28.
11 MR. WAHLQUIST: I've got a copy.
12 Q. (By Mr. Wahlquist) I'm asking, where is the
13 original note?
14 THE WITNESS: I believe I delivered it to you
15 last time.
16 MR. QUESENBERRY: Oh, yeah. And we provided
17 copies pursuant to your request.
18 MR. WAHLQUIST: Thank you for providing those.
19 Q. (By Mr. Wahlquist) Do you believe
20 Mr. Quesenberry has the original copy?
21 **A. I do.**
22 MR. QUESENBERRY: I do. I have it in my file,
23 I believe. I'm very confident.
24 Q. (By Mr. Wahlquist) So is it your testimony
25 that you signed the original of this note at Jae's

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1 request and then he turned it over and wrote on the back
2 and gave it back to you?
3 **A. That's correct.**
4 Q. So how would he then have a document to show
5 the Michelin Trust people?
6 **A. There's two of them.**
7 Q. There were two originals?
8 **A. Yeah, one for me, one for him.**
9 Q. Are you talking about two originals of the
10 promissory note agreement that is the third page behind
11 the initial disclosures?
12 **A. Yes.**
13 Q. You're not talking about an original of the
14 third page and then an original of the fourth page?
15 **A. No.**
16 Q. Okay. So he had you sign two documents, two
17 originals of the promissory note agreement, dated
18 November 15, 1999?
19 **A. Correct.**
20 Q. And then on one of those he wrote a note on
21 the back, which we'll look at in a minute, and then gave
22 that original to you?
23 **A. That's correct.**
24 Q. And then he took the other original?
25 **A. Correct.**

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1 Q. So you understood that the document that he
2 had to show the Michelin Family Trust did not have his
3 handwritten note on the back?
4 **A. Right.**
5 Q. Because you had it?
6 **A. Right.**
7 Q. And you understood that he was going to show
8 this original note you had just signed to the Michelin
9 Family Trust people?
10 **A. I believe that's what he told me. I don't**
11 **remember the details.**
12 Q. You knew at the time that you delivered that
13 note to Mr. Forschen that if this money did not come
14 through from this big loan that Harvest Marketing was
15 applying for, that you would not be paying the Michelin
16 Family Trust any amount?
17 **A. That's correct.**
18 Q. Did you not feel at the time that you were
19 signing this document that you were assisting Jae to
20 deceive the Michelin Family Trust people?
21 **A. Really, let's say -- call it stupidity, I**
22 **mean, or the fact that I believed what Jac was, you**
23 **know, telling me, and he was -- his level of confidence**
24 **and he was the trustee. And I don't know what he was**
25 **going to do with the document. He just, you know,**

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1 convinced me that it would be beneficial.
2 And in retrospect, it was probably one of the
3 dumbest things I did is to sign it. But I did it. And
4 I did it because I felt that -- you know, a little
5 pressure. You know, at the time, he was saying, "I'm
6 going to do this." And he's trying to help me and so if
7 I could help him, I thought I'd do it. I didn't think
8 of it in terms of deceiving anybody or -- he was -- he
9 wanted to evidence a note. This is how he was going to
10 pay somebody back.
11 Q. But you knew that wasn't how it was happening?
12 **A. No. I mean, he's telling me, the loan, that**
13 **it's done, it's going to happen, and the money's going**
14 **to come in and we're going to pay it back. So I'm**
15 **taking for face value that, yes, the money's coming in,**
16 **and before -- whether he writes it out of his or whether**
17 **it comes out of that, that he's going to have the money**
18 **to me. And if he wants to go out there, then that's**
19 **where it went.**
20 Q. So what you're saying is at the time you
21 signed the document, you fully anticipated the loan
22 would be funded?
23 **A. Based on his representations, I was very**
24 **hopeful and optimistic.**
25 Q. But not sure?

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1 **A. No. Never sure.**
2 Q. But you were optimistic that it would be
3 funded?
4 **A. Yeah.**
5 Q. And you knew at the time that you signed the
6 promissory note agreement dated November 15, 1999, that
7 this wasn't a straight-up deal but hoped that the money
8 would be coming in so that the obligation would be paid
9 in any event?
10 **A. I don't know what you mean by "straight-up**
11 **deal."**
12 Q. Well, Harvest Marketing/First Harvest didn't
13 intend to pay these people \$175,000, did they?
14 **A. Only if the money came in that he was saying**
15 **was coming. That's what he was representing, that this**
16 **loan was going through First Harvest, and when that**
17 **money hit, it was going to be paid back through First**
18 **Harvest, that's the representation, and I didn't see --**
19 Q. And if it didn't hit, it wouldn't be paid?
20 **A. That's right. And if it didn't hit, that's**
21 **why I had him sign on the back to say you -- if it**
22 **doesn't materialize as you're telling me, it's your**
23 **problem.**
24 Q. Have you filed a cross-claim against him in
25 this case?